No. 11842

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS RAPHAEL DE PRATU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal From The District Court of the United States for the District of Montana

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CASES CITED

UNITED STATES STATUTES CITED

MONTANA STATUTES CITED

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JURISDICTIONAL STATEMENT

In this case the defendant was charged by indictment filed in the District Court of the United States, District of Montana, Helena Division, with a violation of the provisions of Section 746 (a) (18), Title 8 United States Code, by knowingly, falsely and feloniously having represented himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen.

The District Court had jurisdiction by virtue of the provisions of Section 41, Title 28 United States Code, under which the District Courts have original jurisdiction of all crimes and offenses cognizable under the authority of the United States.

A judgment of conviction having been rendered in the District Court, an appeal was taken to this Court under the New Federal Rules of Criminal Procedure, which follow Section 687, Title 18, United States Code, effective March 21, 1946.

This Court has jurisdiction of the appeal by virtue of the provisions of Section 225, Title 28, United States Code.

STATEMENT OF THE CASE

The defendant, Louis Raphael De Pratu, was charged by an indictment containing three counts with falsely representing himself to be a citizen in violation of Section 746 (a) (18) Title 8 United States Code.

The first count charges that on or about June 27, 1946, the said defendant, in an application for a retail liquor license under the laws of the State of Montana, filed by him with the Montana Liquor Control Board at Helena, Montana, knowingly, falsely and feloniously represented himself to be a citizen of the United States, whereas in

truth and in fact the defendant was not a citizen (tr 2).

Count two of the indictment charges a like offense alleged to have been committed on January 15, 1946, in an application filed with the Montana Liquor Control Board (tr 3).

Count three charges that on September 11, 1946, the defendant falsely claimed citizenship through the naturalization of his father under oath before a board of special inquiry of the Immigration and Naturalization Service of the United States at Sweetgrass, Montana (tr 2-4).

The defendant moved to dismiss each count of the indictment upon the ground that an offense against the laws of the United States was not charged (tr 8), but the motion was denied (tr 10).

The defendant moved for a bill of particulars (tr 5) which was denied (tr 10).

The cause was tried before a jury and at the conclusion of the government's case a motion was made for a judgment of acquittal upon each count of the indictment (tr 134). The motion separately addressed to each count of the indictment was denied by the Court (tr 140).

The defendant offered testimony in his own behalf and at the conclusion of the evidence renewed his motion for a judgment of acquittal (tr 179). The motion was by the Court denied (tr 181) and the case was submitted to the jury.

The jury returned a verdict of guilty (tr 17) whereupon the defendant was sentenced to serve terms of 16 months on each of the three counts of indictment to run concurrently and to pay fines of $500.00 under each count of the indictment (tr 18) from which judgment of conviction this appeal is prosecuted (tr 20).

The defendant and appellant contends that the several counts of the indictment failed to charge offenses against the laws of the United States, and that the motion to dismiss should have been granted; that the Court erred in failing to grant the defendant's motion for judgment of acquittal made at the close of the government's case and renewed at the close of all the evidence; that the Court erred in excluding certain offers of proof, and in excluding from evidence certain exhibits offered by defendant, in admitting certain exhibits for the government over objection, in admitting certain testimony over objection and in denying motions to strike that evidence, in failing to give certain instructions offered by the defendant, in overruling exceptions of counsel to remarks of the Court, and in overruling exceptions to the oral charge of the jury to which specific objections were made (tr 247).

These grounds of error hereinafter separately set forth it is contended require the reversal of the judgment of conviction in this case.

SPECIFICATIONS OF ERROR

1. The Court erred in denying the motion for the dismissal of the first count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

2. The Court erred in denying the motion for the dismissal of the second count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

3. The Court erred in denying the motion for the dismissal of the third count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

4. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the first count of the indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction (tr 140).

5. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the second count of the indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction (tr 140).

6. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the third count of the indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction (tr 140).

7. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the first count of the indictment made at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (tr 181).

8. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the second count of the indictment at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (tr 181).

9. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the third count of the indictment made at the close

of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (tr 181).

10. The Court erred in excluding the evidence contained in offers of proof 1, 2, 3 and 5, all made while the witness Paul W. Smith was on the stand, relating to the circumstances under which the applications for liquor licenses were considered by the Montana Liquor Control Board, these offers of proof being set forth in the appendix to this brief, pages 55-57.

11. The Court erred in admitting Government's exhibit number five, an alien registration form, a photostatic copy of which appears at page 96-98 of the transcript to which objection was made as follows:

> "the same is incompetent as evidence to prove that the defendant is not a citizen and upon the further ground it would not be admissable as an admission until the corpus delicti has first been shown by competent evidence,
>
> The Court: Objection will be overruled, the exhibit will be admitted."

12. The Court erred in excluding from evidence certain minutes of the Stockmen's Club, a corporation, contained in proposed exhibits 10, 12, 17, 18, set forth in full in the appendix hereto, pages.....

13. The Court erred in refusing to give defendant's offered instruction number ten (tr 204).

14. The Court erred in refusing to give the defendant's offered instruction number eleven (tr 205).

15. The Court erred in refusing to give the defendant's offered instruction number twelve (tr 205).

16. The Court erred in refusing to give the defendant's offered instruction number thirteen (tr 205).

17. The Court erred in refusing to give the defendant's offered instruction number fourteen (tr 206).

18. The Court erred in refusing to give the defendant's offered instruction number sixteen (tr 207).

19. The Court erred in refusing to give the defendant's offered instruction number twenty-one (tr 208).

20. The Court erred in refusing to give the defendant's offered instruction number twenty-three (tr 209).

21. The Court erred in refusing to give the defendant's offered instruction number twenty-four (tr 210).

22. The Court erred in refusing to give the defendant's offered instruction number twenty-five (tr 210).

23. The Court erred in refusing to give the defendant's offered instruction number twenty-six (tr 210).

24. The Court erred in its oral charge to the jury defining the word "knowingly" (tr 222) to which objection was made before the jury retired (tr 242).

25. The Court erred in its oral charge to the jury in defining the word "falsely" (tr 223) to which objection was made before the jury retired (tr 243).

26. The Court erred in its oral charge that the direct evidence of one witness entitled the full credit was sufficient for proof of any fact embodied in the case (tr 225) to which objection was made before the jury retired (tr 244).

27. The Court erred in its oral charge to the jury in stating that the defendant having been born in Canada was an alien (tr 239) to which objection was made before the jury retired (tr 245).

28. The Court erred in its oral charge to the jury in stating that the defendant knew that in order to do business he applied for a liquor license himself and was to

hold it for two years until the club became qualified (tr 238) to which objection was made before the jury retired (tr 244-5).

29. The Court erred in overruling the exceptions made to the remarks of the Court during the course of the argument of the case to the jury (tr 211-2).

All of the foregoing specifications of error were incorporated in the statement of points filed in the District Court (tr 247) and adopted in this Court (tr 255).

ARGUMENT

THE INDICTMENT FAILS TO CHARGE A PUBLIC OFFENSE

Specification of Error No. 1

The Court erred in denying the motion for the dismissal of the first count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

Specification of Error No. 2

The Court erred in denying the motion for the dismissal of the second count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

Specification of Error No. 3

The Court erred in denying the motion for the dismissal of the third count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

The sufficiency of the Indictment was raised in the lower court by motion to dismiss (tr 8) which was by the court denied (tr 29).

The first count of the indictment reads as follows:

"On or about June 27, 1946, at Helena, in the District of Montana, and within the jurisdiction of this Court, the above named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself

to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, in an application for a retail liquor license under the laws of the State of Montana filed by him with the Montana Liquor Control Board, did state as follows:

"Are you a citizen of the United States? A. Yes," whereas in truth and in fact the said defendant was not then and never has been a citizen of the United States, which he, the said defendant, well knew." (tr 2)

The second count is identical with the first save for the date of the offense which is alleged to be January 15, 1946 (tr 3).

The third count of the indictment is as follows:

"On or about September 11, 1946, at Sweetgrass, in the District of Montana, and within the jurisdiction of this Court, the above named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, before a board of special inquiry of the Immigration and Naturalization Service of the United States, having been first duly sworn as a witness did wilfully and knowingly testify in part as follows:

"Q. Of what country are you now a citizen? A. United States . . . I acquired United States citizenship through my father who naturalized in the United States while I was a minor," whereas in truth and in fact, the defendant was not then and never had been a citizen of the United States, as he, the said defendant then well knew." (tr 3)

It is our contention that the indictment is fatally defective for the reason that in each count the fraudulent purpose for which the defendant is alleged to have made a false representation of citizenship is not set forth and it

is not alleged, nor is it shown, that the one to whom the representations were made had a right to inquire into or an adequate reason for ascertaining the defendant's citizenship.

Section 746 (a) (18) Title 8, U. S. Code, under which the indictment was drawn provides:

> "(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—"
>
> "(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."

In United States v. Achtner (CCA2) 144 F. (2d) 49, the court discusses the history of this statute, stating: (p. 50)

> "The statute, 8 U. S. C. A., Sec. 746 (a) sets out in thirty-four numbered subdivisions at least that number of separate offenses related in some way to naturalization proceedings, citizenship status, and the control of aliens in this country. It represents for the most part a codification in one place in the Nationality Act of 1940 of offenses formerly scattered in various places. Subdivision (18), with which we are immediately concerned, makes it a felony for any alien 'knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.' This subdivision is a substantial re-enactment of the repealed 18 U. S. C. A. Sec. 141, originally passed in 1870, which, under the heading, 'Falsely claiming citizenship,' made liable to fine and imprisonment of person who 'for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship.' Thus, the only pertinent difference between the definitions of the two sections is that the present statute has

substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.' "

The Court stated: (p. 52)

"But we agree with the District Court that the representation of citizenship must still be made to a person having some right to inquire or adequate reason for ascertaining a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken as a mere boast or jest or to stop the prying of some busybody, and the use of the words 'knowingly' and 'falsely' implies otherwise. Thus, it is said that the word 'falsely,' particularly in a criminal statute, suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously,' Dombroski v. Metropolitan Life Ins. Co., 126 NJL 545, 19 A. 2d. 678, 680, 20 A. 2d. 441; 35 C. J. S., Falsely, pp. 626, 627, or 'with intent to defraud,' as has been held with respect to the counterfeiting laws, United States v. Otey, C. C. Ore., 31 F. 68; United States v. King. C. C. Ohio, Fed. Cas. No. 15,535; United States v. Moore, D. C. N. D. N. Y., 60 F. 738; United States v. Glasener, D. C. S. D. Cal, 81 F. 566; Kaye v. United States, 7 Cir., 177 F. 147, 151; Dreyer v. McCormack Real Estate Co., 164 App. Div. 41, 149 N. Y. S. 322, a construction particularly applicable here where the required lack of truth of the representation is set forth in other express language of the statute."

It is the appellants contention that the representation of citizenship must be made for a fraudulent purpose; that as the court said in the Achtner case, supra, "words spoken as a mere boast or jest or to stop the prying of some busybody" would not constitute a crime.

In other words the representation to be fraudulent must be of a *material* fact. Thus, in United States v. Raymond (D. C. Wash.) 37 F. Supp., 957, 958, Judge Schwellenbach stated:

"The rule is universally recognized that for a representation to be fraudulent it must be made concerning

a material fact with knowledge of its falsity and with intent to deceive. . . . "

The decisions under Section 746 (18) Title 8 hold that while the statute if literally read would subject the accused to punishment for making a false representation as to citizenship regardless of the circumstances, it must be construed to include fraud as an essential element.

United States v. Romberg (CCA 2)
150 F. (2d) 116

United States v. Tandaric (CCA 7)
152 F. (2d) 3

Therefore, we contend that since a fraudulent purpose is an essential element of the crime, it must be alleged in the indictment.

Since the trial of this case, United States v. Weber (D. C. Ill.) 71 Fed. Supp., 88, has been reported, squarely supporting our contention. The Court said: (pp. 90-91)

"The question before me in the present case is whether an indictment which fails to charge an element of a statutory crime is sufficient, when such element is not actually contained in the statute but rather is interpreted into it, as was done by the Circuit Court of Appeals for the Seventh and Second Circuits of the Tandaric and Achtner cases. . . .

All ingredients which enter into the offense, whether set down in the statute in terms *or interpreted into it, must be stated.*" . . .

In United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, the Supreme Court said:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless these words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished; . . .

> . . . The indictment in the present case charges that defendant, who was not a citizen of the United States, falsely represented himself to the Andrews Company, and to its officials, as being a citizen. These facts might all be admitted to be true, and yet the defendant have been innocent of the crime with which he is charged. He might have made the representation to a person who had no right to inquire into, or an adequate reason for ascertaining, the defendant's citizenship, or, as the court said in the Achtner case, to stop the prying of some busybody. Under none of these conditions would the defendant have been guilty of the crime with which he is charged. There is no distinct or specific allegation in the indictment advising defendant of the fraudulent purpose for which he is accused of having made the false representation as to his citizenship. Defendant is entitled to have all of these facts sufficiently set forth in order that he may prepare his defense; and they must be sufficiently definite to be pleaded in bar of a subsequent prosecution. I do not believe that the indictment meets these requirements."

THE MOTION FOR THE ENTRY OF A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED

Specifications of Error No. 4 to 9, inclusive.

> The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal made at the conclusion of the Government's case and renewed at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (tr 140). (tr 181).

The defendant appropriately moved for a judgment of acquittal as to each count of the indictment at the close of the Government's case (tr 140) and at the close of all the evidence (tr 181), but the motions were denied.

While evidence was offered on the part of the defendant the only facts developed with respect to the citizenship status of the defendant were those presented in the Government's case.

The defendant contends that the Government failed to show that the defendant had not been naturalized or otherwise admitted to citizenship beyond a reasonable doubt, and that accordingly there was a failure of proof of an essential element of the crime charged in each count of the indictment. Accordingly each of the Specifications of Error Nos. 4 to 9 inclusive raise the same legal question.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A JUDGMENT OF CONVICTION

To sustain the allegations of the indictment, the Government offered in evidence two applications for retail liquor licenses filed with the Montana Liquor Control Board, signed by the defendant De Pratu. Plaintiff's exhibit one is dated June 27, 1946 (tr 75). Plaintiff's exhibit two is dated January 15, 1946 (tr 77). Photostatic copies appeared in the transcript. The applications each contain the following representation relied upon by the Government:

"(4) Are you a citizen of the United States: YES (tr 75)."

Count one of the indictment is based on Exhibit one. Count two of the indictment is based on Exhibit two. The third count is based on the following facts.

Arthur Matson, an Immigrant Inspector (tr 106), testified that on September 11, 1946 (tr 125), he conducted a hearing at Sweet Grass, Montana, at which the defendant testified. Pursuant to interrogation by the court he said:

"The Court: I don't care what you usually say, what did you say to that man?

A. Of what country are you now a citizen.

The Court: What did he say?

A. He said of the United States." (tr 129)

On cross examination he testified:

"Q. Did you ask him how he acquired United States citizenship. A. Yes.

Q. What answer did he give you?

A. He said someone had told him he had acquired it because he came to the United States when a young fellow, that's about the way.

Q. So, are you now satisfied that in answer to the question 'How did you acquire United States citizenship' that the defendant answered, 'I didn't, they told me I was under age and that I was a citizen?'

A. Well, that's correct." (tr 131-132)

As evidence that the defendant was not a citizen, an alien registration form was introduced in evidence which had been signed by the defendant in 1940 (tr 97) which states that the defendant was born on October 21, 1878, at Alexandera, Ontario, Canada; that he entered the United States on August 15, 1896, by train at Sault St. Marie, Michigan; had lived in the United States 43 years and expected to remain permanently. The form also states:

"I am a citizen or subject of UNCERTAIN, BUT LAST OF CANADA."

A certificate of non-existence of naturalization record was offered in record which recites:

". . . There does not appear therein any record filed pursuant to the foregoing statutes nor any record whatsoever evidencing the naturalization of one Louis Raphael De Pratu or Louis Patrick De Pratu." (tr 100)

A stipulation was also offered in evidence that the defendant had on February 8, 1936, filed an application for registry as an alien which states:

"I, Louis Raphael De Pratu, Gillman, Montana, an alien, believing that there is no record showing that I am now a lawful permanent resident of the United States, hereby request that under the provisions of the Act of Congress approved March 2, 1929, a record of

registry of my arrival in the United States be made." (tr 102)

It was also stipulated, however, in connection with this application for registry as follows:

"That on April 15, 1937, the defendant was advised by the United States Department of Labor Immigration and Naturalization service that the central office in Washington had cancelled the application for registry filed by Louis Raphael De Pratu on February 10, 1936, and returned him the registry fee submitted with his application. The central office further advised that this action was taken for the reason that registry in the case was unnecessary since it appeared that De Pratu entered the United States prior to June 30, 1906." (tr 102)

An official of the Immigration and Naturalization Service whose territorial jurisdiction included Montana, Idaho, a part of Washington and Oregon (tr 100), testified that the records in his office did not disclose a record of the defendant's naturalization (tr 104). On cross examination he testified:

"Q. You state you have no record of application for naturalization made by Mr. De Pratu. Isn't it true that if a child is automatically made a citizen of the United States by reason of the naturalization of his parent, you would have no record of it?

A. Not necessarily.

Q. You would have if they applied for a derivative certificate? A. That's right.

Q. But otherwise you would not have?

A. That's right. (86)

Q. Mr. Nooney, do you know whether or not that is true of every immigration and naturalization office with respect to the records of children?

A. Yes, sir, that is correct." (tr 104-105)

It is our contention that this evidence is wholly insufficient to establish that fact that the defendant was an alien.

ALIENAGE WAS NOT SHOWN BEYOND A REASONABLE DOUBT

An analysis of the evidence fails to show that defendant was not a citizen of the United States, as charged.

Counts one and two of the indictment charge the defendant with falsely representing himself to be a citizen in general terms—no particulars are given. Count three, however, sets forth in what way defendant claimed citizenship, and alleges that such a claim was false. The language of the third count with respect to the claim of citizenship is as follows:

> "The above named defendant . . . . did wilfully and knowingly testify in part as follows: 'Q. Of what country are you now a citizen? A. United States . . . I acquired United States citizenship through my father who was naturalized in the United States while I was a minor,' whereas in truth and in fact, the defendant was not then and never had been a citizen of the United States, as he the said defendant then well knew." (tr 3-4)

This raises the question as to whether defendant's father was a citizen of the United States. Count three states that that was defendant's claim to citizenship. Count three therefor is the important count in the indictment. If the proof is insufficient on that count, then it is insufficient as to the other two counts.

It should first be noted that no where in the record is there any evidence of the citizenship, or lack of citizenship of defendant's father. The father's name was not mentioned at any time. Count three charges that defendant made a claim to citizenship through his father and the witness Matson testified that defendant made such a statement. (tr 115, 131) But there is nothing in the record to

show such a statement was untrue. The record is entirely silent.

There being no proof as to the non-citizenship of defendant's father, does the other proof submitted sustain the charge?

Exhibit 6 is a certificate of non-existence of naturalization record of Louis Raphael De Pratu. (tr 99-100) The testimony of the witness Nooney (tr 103-104) is that the Spokane office of the Immigration and Naturalization Service did not show a record of the naturalization of defendant. This evidence establishes one thing only—that there is no record of defendant's naturalization. It could be held from this evidence that defendant was not naturalized, through his own naturalization. But this evidence proves nothing further. However, that is not the false claim of citizenship charged against defendant. According to the testimony of the witness Matson, defendant claimed citizenship, not through his own naturalization, but by reason of the naturalization of his father.

If defendant became a citizen through the naturalization of his father there would be no record of defendant's citizenship in the Immigration and Naturalization Service. (See cross examination of witness Nooney set forth above.)

Exhibit 6 is therefore no proof whatever as to the falsity of the charge against defendant.

Exhibit 5 is the Alien Registration form of Louis Raphael De Pratu. (tr 96-98) It establishes that defendant was born in Canada on October 21, 1878; that he came to the United States on August 15, 1896, had lived in the United States for forty-three years, and expected to remain permanently. This form was executed in 1940. As to citizen-

ship, it shows that defendant states, in answer to the question as to the country of his citizenship, "Uncertain, but last of Canada."

Is this exhibit evidence of non-citizenship of defendant? It merely shows that defendant was born in Canada, that he came to this country when seventeen years of age and has resided continuously in United States since that time, and that he was uncertain of his citizenship. The exhibit certainly does not prove he is not a citizen.

The Alien Registration Law required all aliens to register, and provided a penalty for failure to register. 54 Stat. 675, U. S. C. Title 8, Sec. 457. No penalty was provided if a citizen did register, or if a person registered who was uncertain as to his citizenship. If defendant was uncertain of his citizenship at that time, he did the prudent thing—he registered.

There evidently was a doubt in the mind of defendant in 1940 as to his citizenship as disclosed by exhibit 5. But that doubt might have been removed before 1946, the date of the acts alleged in the indictment. It is not unusual for people to be doubtful as to their citizenship. And particularly is this true of children, born of aliens or born of citizens, or whose parents were naturalized after the child's birth.

Does exhibit 5 prove that defendant was not a citizen? Does it prove that defendant's father was not a citizen? We cannot see how it proves either one of these points. It can be, and is contended by defendant, that exhibit 5 shows that he could be a citizen. This is discussed later in this brief.

This leaves only the application for certificate of registry. (tr 102) The record shows that it was stipulated that on February 8, 1936, defendant filed an application for certificate of registry under the Act of March 2, 1929, and that on April 15, 1937, the application was cancelled since it appeared that defendant entered the United States prior to June 30, 1906.

The Act of June 29, 1906, 54 Stat. 1152, U. S. C. Title 8, Sec. 729, provides that a certificate of arrival shall be issued to each person, not a citizen, who enters the United States after the date of the Act. It further provides that no certificate of arrival is necessary for a person entering prior to June 29, 1906.

The Act of March 2, 1929, 45 Stat. 1512, 1513 (now found as amended in U. S. C. Title 8, Sec. 728) provides that if no record of arrival of an alien (who arrived after June 29, 1906) can be found, an application for registry might be made, and a certificate of registry issued, upon compliance with that law.

Defendant was, therefore, in the year 1936, attempting to have a record made of his arrival into this country. But since it was found that he had entered prior to June 30, 1906, the application was cancelled.

Does this show that defendant or his father were not citizens? Four years later, in his Alien Registration Form (Exhibit 5), defendant stated that he was uncertain as to his citizenship. Perhaps this uncertainty existed in 1936, and defendant was attempting to clear it up. Then too, defendant might have been attempting to secure a record of his entry in order to apply for a certificate of derivative citizenship. The form used in applying for a certificate of registry is the same whether the applicant is an alien, or a

derivative citizen desiring a derivative certificate. It is difficult to see how this can be considered proof that defendant was not a citizen in 1946.

We have considered all of the evidence and proof submitted by plaintiff to show that defendant was not a citizen in 1946. We respectfully submit that there is nothing in the record to show that defendant was an alien in 1946. And particularly is there nothing in the record to show that he was not a citizen by reason of his father's naturalization—and that is the charge against him.

DERIVATIVE CITIZENSHIP IS POSSIBLE

It is the contention of defendant that the proof submitted against him, not only does not prove he is alien, but is consistent with his statement set out in count three that he is a citizen by reason of his father's naturalization—derivative citizenship.

It is unnecessary to again set out the evidence produced against defendant, and which has heretofore been analyzed. As is hereinafter pointed out, the Court laid more stress on Exhibit 5, to show alienage, than any other part of the evidence.

Exhibit 5 is the Alien Registration Form (tr 96-98). It shows that defendant came to the United States from Canada on August 15, 1896, and when he was seventeen years of age. (He was born in Canada, October 21, 1878.) It further shows that he has resided continuously in the United States since that time.

In view of these uncontradicted facts, could defendant have acquired citizenship through the naturalization of his father? It is plain that he could. The law in effect at the time of defendant's entry and at the time he reached the age of twenty-one years was as follows:

"The children of persons who have been naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons, who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." Act of April 14, 1802, Revised Statutes Sec. 2172.

"All children out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States. . . . " Act of April 14, 1802, Rev. Statutes Sec. 1993.

In construing Section 2172, the Supreme Court held that it operated prospectively. See Boyd v. Nebraska ex. rel. Thayer, 143 U. S. 135, 12 Sup. Ct. Rep. 375, 36 L. Ed. 103.

From these statutes, the defendant could have acquired citizenship from his father, in one of two ways, namely:

1. If defendant's father had been naturalized as a citizen of the United States prior to the birth of defendant, defendant would have been a citizen of the United States at birth, even though born in Canada. In other words, naturalization of defendant's father would have conferred citizenship upon defendant.
2. If defendant's father had been naturalized in the United States during the minority of defendant, defendant would have become a citizen of the United States—a derivative citizen. Particularly would this be true since the evidence establishes that defendant entered the United States while only seventeen years

of age, and has resided continuously in the United States since that time. (Exhibit 5—tr 96-98)

Section 2172 has been amended by the Nationality Act of 1940. 54 Stat. 1145, U. S. C. Title 8, Sec. 714. It now provides that derivative citizenship is acquired only if the child has been lawfully admitted to the United States for permanent entry. But this has no application, as it was not in effect at the time defendant entered the United States nor when he arrived at his majority.

54 Stat. 1150, U. S. C. Title 8, Sec. 739, provides for the issuance of a certificate of derivative citizenship to those who have derived citizenship through the naturalization of a parent. This section does not confer citizenship, but makes provision for tangible evidence of citizenship.

In re Tate, DC Pa. 1 F. 2d. 457

The application of defendant for a certificate of registry was used as evidence against him (tr 102). In view of the amendment to Section 2172, noted above, could it not be properly concluded that defendant was taking the first step to secure a certificate of derivative citizenship, by having a record made of his legal entry? We submit that it could.

Since there is no evidence in the record to show the non-citizenship of defendant's father, we submit that the evidence produced at the trial not only failed to prove that defendant was not a derivative citizen, but is consistent with the fact that he is a derivative citizen.

THE PRESUMPTION OF INNOCENCE CONTROLS

The only evidence submitted to show defendant's lack of citizenship is found in Exhibit 5—Alien Registration Form (tr 96-98). The Court, in overruling defendant's motion for verdict of acquittal at the close of plaintiff's

case, and at the close of all the evidence, stated that this exhibit established defendant to be a citizen of Canada and an alien to the United States, and relied upon the presumption that a thing once shown to exist is presumed to continue so long as things of that nature exist (tr 138). In instructing the jury the Court made practically the same statement (tr 239). In other words the Court held that the defendant having been born in Canada was a Canadian citizen, and that it is presumed that that situation continues to exist. While we will discuss these rulings and instructions of the Court later in this brief, it has been deemed proper to discuss the presumption of innocence under this portion of the brief.

It is elementary that defendant cannot be presumed guilty of a crime, nor can he be found guilty by guesswork. He is presumed innocent and every essential element of the offense must be proven. The non-citizenship of defendant is an essential element of the offense with which he is charged and must be proven beyond a reasonable doubt.

Duncan v. United States (CCA 9)
68 F. 2d. 136

Gulotta v. United States (CCA 8)
113 F. 2d. 683

Colt v. United States (CCA 5)
158 F. 2d. 641

Section 10602, R. C. M. 1935, provides:

"A presumtion is a deduction which the law expressly directs to be made from particular facts."

Section 10606, R. C. M. 1935, provides:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

32. That a thing once proved to exist continues as long as is usual with things of that nature."

The presumption which may be evidence in a court action will not overcome the presumption of innocence. Thus, in People v. Scott (Cal.) 133 Pac. 496, 499:

> "if it were a civil action, that the presumption of delivery would follow from the fact of possession of the instrument, this cannot be indulged in opposition of the presumption of innocence, where a material element of a serious criminal charge is involved."

In State v. Wakefield (Ore.) 228 Pac. 115, 121, the court said:

> "Section 799, subd. 30, Or. L., is as follows:
>
> > 'That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.'
>
> This presumption is disputable, and is overcome in a prosecution for adultery by the stronger presumption that the defendant is innocent."

In State v. Sanford (N. M.) 97 Pac. (2d) 915, 921, the court said:

> "In Encyclopedia of Evidence, Vol. 9, Presumptions, page 906, it is said: '8. Presumption of Continuance. —A. Generally.—The general statement is sometimes made that a fact, relation, or state of things once shown to exist is presumed to continue until the contrary appears. Such a proposition, however, is not true without regard to the fact involved; it is only those facts or states which are continuous in their nature that are legally presumed to continue.' "

The court then cited from Carver v. United States 160 U. S. 553, 40 L. Ed. 532, in part as follows:

> " 'The statements of Miller made at the later interview, if not coming within the category of dying declarations, were hearsay, and should not have been permitted to go to the jury. It was incumbent upon the state to lay the foundation for their admission as dying decla-

rations. Defendants could rely upon the presumption of innocence, and deceased then believed he might recover.' "

The Court then stated:

"The last sentence of the foregoing quotation suggests a consideration of the rule stated by Mr. Lawson in his work on the Law of Presumptive Evidence at page 240, as follows: 'In the case of conflicting presumptions the presumption of the continuance of things is weaker than the presumption of innocence.'

"An examination of the authorities relating to the rule that the existence of a state of facts or condition once proven to exist continues, is ordinarily invoked in civil cases only. In our opinion, in accordance with the view expressed by Professor Lawson, and also by Judge Blanchard in State v. Sadler, the so-called presumption should be sparingly applied in a case where the life or liberty of an accused is at stake."

In 16 C. J. Sec. 1033, page 542, it is stated:

"Some courts state the rule broadly to be that, as between conflicting presumptions, that which is in favor of the innocence of accused prevails. At any rate, where two equal presumptions, one in favor of guilt, are presented, the one in favor of innocence is to be preferred and applied; and where the circumstances and lack of proof are such that the presumption of the continuance of a fact is a weak one, it is overcome by the presumption of innocence."

In Morrison v. California, 291 U. S. 827, 78 L. Ed. 664, 670, it is stated:

" 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' "

See also: Jones on Evidence, 4th Ed. Sec. 101, p. 176.

Dunlop v. United States,
165 U. S. 486, 503, 17 Sup. Ct. Rep. 375, 41 L. Ed. 799, 804

Edwards v. United States (CCA 8),
7 F. 2d. 357, 362

THE CORPUS DELICTI CANNOT BE ESTABLISHED BY THE ADMISSIONS OF THE DEFENDANT

In Duncan v. United States (CCA 9), 68 F. (2d) 136, 142, 143, certiorari denied 54 Sup. Ct. 780, 292 U. S. 646, 78 L. Ed. 1497, the charge was falsely representing citizenship under Section 141 of Title 18. This court said:

> "Appellant argues that all these proofs as to appellant's Rumanian birth and alien citizenship are based on statements and admissions of the defendant, and, therefore, have no higher probative value than the statements and admissions by the appellant, and that such statements and admissions are insufficient to prove the corpus delicti. There can be no doubt of this fundamental rule relied on by appellant."

> "With reference to the second count, the charge is that the appellant falsely represented himself to be a citizen of the United States without having been duly admitted to citizenship, etc., in violation of 18 USCA Sec. 141. In order to establish this charge it is not only necessary for the prosecution to show that the appellant was not born in Camden, N. J., but also to show that he was not a citizen of the United States. There is no evidence to establish that fact other than the admissions of the appellant as hereinbefore stated. These were insufficient to prove the corpus delicti."

In Gulotta v. United States (CCA 8), 113 F. (2d) 683, where the charge was under Section 141, Title 18, the court said: (685-686)

> "The appellant's second contention is the more serious. It is that the evidence is not sufficient to support conviction. He relies upon the long-estabished rule that 'extra judicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.'"

> "The independent evidence need not be of itself sufficient proof of guilt, but need only be a substantial showing which together with the defendant's confession

or admission establishes the crime beyond a reasonable doubt. Gregg v. United States, 8 Cir., 113 F. 2d. 687, decided at the present term; Pearlman v. United States, 9 Cir., 10 F. 2d. 460, 462. But the rule requires some such independent evidence, and it is conceded by the Government that the record is barren of all such extrinsic evidence in this case, unless a distinction be made between confessions and admissions. And it is argued that such a distinction should be made."

"The rule that to warrant conviction of a crime both confessions and admissions must be corroborated by some independent evidence is illustrated in cases very similar to the present."

"In the absence of such a showing admissions and confessions are received in evidence with the caution and under the necessity of independent proof of the corpus delicti, however alight such proof may be."

In United States v. Isaacson (CCA 2), 59 F. (2d) 966, 967, 968, where the charge was a violation of 8 U. S. C. A. 414 (now 738-746 Title 8) the court said:

"The ancient rule that required the testimony of at least two witnesses to prove the crime of perjury has, indeed, been relaxed. Hashagen v. United States (C. C. A.) 169 F. 396. But what may be called the modern equivalent of this requirement still obtains. This general rule now requires the oath of one witness to be supported by that of another or by some other independent evidence inconsistent with the innocence of the defendant. United States v. Wood, 14 Pet. 430, 10 L. Ed. 527; Allen v. United States (C. C. A.) 194 F. 664, 39 L. R. A. (N. S.) 385; United States v. Otto (C. C. A.) 54 F. (2d) 277. Otherwise there would be but oath against oath and on the theory, I suppose, that each would give the other the lie direct there would be no sound basis for letting a jury reach the conclusion that the oath against a defendant so overbalanced his own that his guilt was proved beyond a reasonable doubt. At least, this puts the requirement on rational ground as was pointed out in Cohen v. United States (C. C. A.) 27 F. (2d) 713. That case dealt with subornation of perjury,

but the principle involved is the same. Hammer v. United States, 271 U. S. 620, 46 S. Ct. 603, 70 L. Ed. 1118."

EXHIBIT 5 SHOULD HAVE BEEN EXCLUDED

Specification of Error No. 11.

The Court erred in admitting Plaintiff's Exhibit 5, over objection.

Exhibit 5 is an Alien Registration form executed by Louis Raphael De Pratu. It recites that he was born in Ontario, Canada, October 21, 1878, that he entered the United States at Sault St. Marie, Michigan, on August 15, 1896, that he expected to remain in the United States permanently, and gives his description. In answer to the question "I am a citizen or subject of," he answered, "Uncertain, but last of Canada." (tr 96-98)

Objection was made to the exhibit when offered, as follows: "Our only objection, your Honor, is upon the ground that the same is incompetent as evidence to prove that the defendant is not a citizen and upon the further ground it would not be admissable as an admission until the corpus delicti has first been shown by competent evidence." (tr 94)

It is unnecessary to set out again the argument that the exhibit fails to disclose that defendant is not a citizen. The date of his birth, the time of his entry into the United States, his length of residence in this country, and his statement as to the uncertainty of his citizenship certainly do not establish, even by inference, that he is not a citizen. Every statement in the exhibit is consistent with the charge against the defendant, namely, that he claimed citizenship through the naturalization of his father while defendant was a minor.

We have heretofore discussed the corpus delicti. It is submitted that the corpus delicti was not proven at any time during the trial. The only proof of lack of citizenship

which was submitted were statements alleged to have been made by defendant.

There is no proof that the party named in the exhibit was the defendant. Except for similarity of name, nothing was produced to show that this exhibit applied to defendant.

THE REFUSAL TO GIVE INSTRUCTIONS ON DERIVATIVE CITIZENSHIP WAS ERROR

Specifications of Error Nos. 22, 23 and 27.

The Court erred in refusing to give defendant's offered instruction No. 25, which reads as follows:

> "You are instructed that all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (tr 210)

The Court erred in refusing to give defendant's offered instruction No. 26, which reads as follows:

> "You are instructed that the naturalization and admission to United States citizenship of a father automatically gave United States citizenship to his children under the age of 21 years lawfully admitted to and residing in the United States prior to the age of 21 years. You are further instructed that a person entering the United States prior to June 29, 1906, is presumed to have been legally admitted to the United States for permanent residence." (tr 210)

The Court erred in instructing the jury that defendant, having been born in Canada, was a Canadian citizen and an alien to the United States.

The Court instructed the jury as follows:

> "Having been born in Canada, that fixed his status, ladies and gentlemen, as a Canadian citizen, and, insofar as American citizenship was concerned, an alien, and

there is no presumption that any alien acquires citizenship or any [218] right of citizenship because of continued long residence in the United States, there is no such presumption as that at all. So, if his statement were that he was born in Canada, and the other evidence in this case is true and believed by you, that establishes that he is a Canadian citizen and thus an alien as far as citizenship in the United States is concerned. He says, 'I am a subject or citizen of what country: Uncertain, but last of Canada.' Now, then, you can again consider, so far as the evidence shows, his intent, and whether or not he was sufficiently acquainted with the language to make his thoughts in that regard clear, and you may consider in that regard whether or not, where he says that his citizenship is uncertain, that is any claim that he believes himself to be an American citizen, or any expression of any thought that he believes himself to be an American citizen, and, if there is any uncertainty in the writing, you may consider the fact that the writing was made by him, and if you find that he had sufficient intelligence and knowledge of the language to choose words which would express thoughts and ideas, but, rather than doing that, he chose words that injected uncertainty into the matter, you, of course, may consider the reason, if any, you think he had for doing those things." (tr 239-240)

The offered instructions 25 and 26, both and each, followed the law with respect to United States citizenship. Section 2172, Rev. Stat., which is part of the Act of April 14, 1802, and which was applicable to defendant's status, reads as follows:

"The children of persons who have been naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons, who now are, or have been, citizens

of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." Revised Statutes Sec. 2172.

Offered instruction No. 26 followed this statute, and is applicable to defendant, and to the evidence submitted. Exhibit 5—the Alien Registration form (tr 96-98)—shows that defendant was living in the United States at the age of seventeen years, and that he entered the United States before June 29, 1906. The application for certificate of registry (tr 102) made by De Pratu was cancelled as he had established that he had entered the United States prior to June 29, 1906 (tr 102). No certificate of arrival is necessary for one entering the United States prior to that date. 54 Stat. 1152, U. S. C. Title 8 Sec. 714.

See:

Boyd v. Nebraska,
12 Sup. Ct. 375, 387, 143 U. S. 135, 36 L. Ed. 103

United States v. Rodgers,
(Pa. 1911) 185 F. 334, 337, 107 C. C. A. 452

North Noonday Min. Co. v. Orient Min. Co.,
(C. C. Cal. 1880) 1 F. 522, 527

Offered instruction No. 25 follows Section 1993 Rev. Stat., which is a part of the Act of April 14, 1802, and which was in effect at the time of defendant's entry into the United States, and at the time of his birth, and at the time of his majority. That statute reads as follows:

"All children out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States. . . . " Rev. Stat. 1993.

It is submitted that this offered instruction can be applicable to defendant and to the evidence introduced. Had

defendant's father been naturalized as a citizen of the United States prior to defendant's birth, even though defendant was born in Canada, defendant would have been a citizen by reason of the naturalization of his father. The charge against defendant is that he falsely claimed citizenship through the naturalization of his father. Defendant was entitled to an instruction as to the manner in which this derivative citizenship could be acquired. The Court gave no such instruction.

It is, therefore, submitted that the court erred in refusing defendant's offered instructions Nos. 25 and 26.

INSTRUCTION GIVEN BY THE COURT AS TO CITIZENSHIP

The instruction given by the Court, and above set forth, is clearly not the law. The same was stated by the Court as the law in his reasons for overruling defendant's motion for a verdict of acquittal at the close of plaintiff's case (tr 138-139). The argument on behalf of defendant at that time and the ruling of the Court, are a good summary of the position of the defendant and of the law as construed by the Court (tr 134-140).

The instruction given by the Court, and to which exception was taken before the jury retired (tr 245) in effect advised the jury that the defendant, having been born in Canada was a citizen of Canada, and an alien to the United States, and that that presumption continued until the contrary was shown. In other words, the burden was upon the defendant to establish his citizenship, in view of the fact that the record showed he was born in Canada.

The Court entirely ignored the provisions of Sections 2172 and 1993, above quoted. In passing upon defendant's exception to the charge the Court stated:

"Your theory, as I view it, all the way through is he came over here when he was under the age of 21—it is a matter of no importance, I am not going to change the charge. Call in the jury." (tr 246)

It is hard to understand the attitude of the Court in this regard. Although the defendant is charged with falsely claiming citizenship through the naturalization of his father; although the law states that a minor child residing in the United States during his minority, gains citizenship through the naturalization of his father during such child's minority; although the record establishes that defendant was in the United States during his minority, and although the record is entirely silent as to defendant's father, the Court stated that it was a matter of no importance that defendant came to the United States while under the age of 21.

The Court relied entirely upon the fact that the evidence showed the defendant to have been born in Canada. To the Court, that was controlling. But it is respectfully submitted, that the statement made by the defendant as to the manner in which he acquired citizenship, necessarily assumes that he was born abroad. If defendant had been born in the United States, he would not need his father's naturalization to become a citizen. He would be a native born citizen in his own right. U. S. Const., Amd. 14. He must have been born abroad to claim citizenship through his father. A derivative citizen is always born abroad (or has lost citizenship by reason of residence abroad, and regained it through the naturalization of his parent). The fact that defendant was born in Canada lends credence to his alleged statement that he acquired citizenship through his father. He could not have become a derivative citizen otherwise.

Further light on the error of the Court and the reason for the instruction given by the Court, is shown in the argument upon the motion for acquittal at the close of plaintiff's case. The Court stated (tr 138-139):

"There is admitted in evidence this exhibit, Exhibit 5, a writing signed by the defendant in which he said he was born at or near Alexandera, Ontario, Canada. That is his statement. If the jury accepts that statement as true, that establishes his citizenship right there, and establishes that he is not a citizen of the United States. Now, there is a legal presumption that a condition once shown to exist is presumed to exist as long as things of that nature exist. So, he has established himself by his statement as a citizen of a country other than the United States. Now, there is no presumption at all that I know of that one gains citizenship by reason of lengthy residence in the United States; no such presumption as that that I know of now exists. In answer to the question, 'I am a citizen or subject of,' he said, 'Uncertain, but last of Canada.' So he there again says that his last citizenship status that he knew about was that of a Canadian. He does say, 'Uncertain,' which means little to my mind, and certainly it doesn't mean that he believes he is a citizen of the United States. He doesn't say there he believes he is a citizen of the United States, but is uncertain about it. He said he was uncertain about his citizenship, the last he knew about it was he was a Canadian. Of course, it is true, and in my opinion, you are correct in your argument that if he came to this country when [119] he was 17 years old, and that is the evidence, and his father or mother came with him, and his father was thereafter naturalized, if he was under 21 years old at the time his father was naturalized, he became a citizen; but if, at the time of his father's naturalization, he was over 21 years of age, he would not become a citizen. But there is no presumption that I know of that his father came here and was naturalized. There is no presumption that he was naturalized while this man was under the age of 21 years, so as to grant to defendant the benefit of derivative citizenship through the citizenship of his father. In other words,

> the question is how far is the government required to go in its proof to exclude all hypotheses and all conjecture, no matter how extreme they may be. I don't think that the government, in order to make a prima facie case, is required to go to that length, is required to go to the length of showing whether the father of this defendant himself became a naturalized citizen of the United States, and further to show that if the father did become naturalized, he did not become naturalized during the minority of this defendant and while this defendant was residing in the United States."

It will be noted that the Court relied upon the presumption that a condition once shown to exist is presumed to exist as long as things of that nature last. This means that since it was shown that defendant was born in Canada, he was an alien, and that it is presumed that he continued as an alien until the contrary was shown. In other words, the burden was upon the defendant to show that he is a citizen.

We have already shown that the non-citizenship is an essential element of the offense charged, and that the presumption of innocense is a stronger presumption than that stated by the Court.

But how long do things of that nature last? Citizenship can be acquired by a residence of five years after a permanent entry. Derivative citizenship passes to the children under age residing in the United States. The charge is that the defendant stated that his father had been naturalized, and that he acquired derivative citizenship by reason thereof. That is the plaintiff's charge, and that is the plaintiff's evidence. What then becomes of the presumption. Is not the presumption overcome by the statement of the defendant, which is the very heart of plaintiff's case? We submit that it has been overcome; that the evidence, having estab-

lished that there had been a change in defendant's citizenship status, over-came the presumption and that it was then incumbent upon the plaintiff to establish defendant's lack of citizenship by direct proof of the lack of citizenship of his father.

An exact situation was presented to the Court in the case of Colt v. United States (CCA 5) 158 F. 2d. 641. In that case defendant was charged with falsely representing himself to be a citizen. The government proved that he was born in Rumania, and proved nothing further. Motion for acquittal was refused on the ground that it having been shown that defendant was born in Rumania, it was presumed that that condition continued to exist. The Circuit Court of Appeals in reversing the decision of the District Court stated:

> "The argument is that having been shown to have been born in Rumania and so not a citizen of the United States, it is *to be presumed* that this status continued in the absence of proof to the contrary, and Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628, is cited as being on the very point of citizenship. That, however, was a civil case where presumptions, especially for shifting the burden of going forward with the evidence, are quite frequently indulged. United States, ex. rel. Meyer v. Day, 2 Cir., 54 F. 2d. 336, is also cited, but that was a deportation case, and not a trial for crime. In a criminal trial the burden ordinarily never shifts. Sometimes by statute such presumptions are validly created in criminal cases, as in Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; and in Yee Hem v. United States, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904; but if arbitrary and unreasonable they may deny due process of law, as was held in Morrison v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664, also cited by appellee. It may be that if the criminal statute here involved had undertaken by creating a presumption of continued alien-

age to require one who is alien born to show naturalization as a defense, the presumption would be upheld as not arbitrary; but this statute is so worded as to require proof by the prosecution of non-naturalization. . . . Since there is no direct proof that Colt had not been naturalized, and the proven circumstances do not reasonable exclude but are consistent with naturalization, we are of the opinion that it cannot be said Colt's guilt is shown beyond a reasonable doubt."

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE

Specification of Error Nos. 17, 20 and 21.

The Court erred in refusing defendant's offered instruction No. 14, which reads as follows:

"The Court charges you that before you can convict on circumstantial [183] evidence the circumstantial evidence must be consistent with the guilt of the defendant upon trial and inconsistent with his innocence, and the evidence must be so strong, clear and conclusive as to the guilt of the defendant as to remove every other reasonable hypothesis except the defendant's guilt." (tr 206)

The evidence as to defendant's citizenship, or lack of the same is entirely circumstantial. The Court gave no instruction as to circumstantial evidence.

The only evidence as to defendant's citizenship was certain statements made by defendant. These did not directly state that defendant was an alien. In fact, exhibit 5 states that defendant was uncertain as to his citizenship. Aside from the question as to the corpus delicti, which has heretofore been discussed, it is submitted that an instruction as to circumstantial evidence should have been given, and that defendant's offered instruction is a proper one.

"To justify a conviction of crime on circumstantial evidence alone, the inferences to be derived from the established circumstances must be inconsistent with any

reasonable theory of innocence." Jones on Evidence, 4th Ed., Sec. 899, page 1681.

THE COURT ERRED IN DEFINING THE WORD FELONIOUSLY

Specification of Error No. 13.

The Court erred in refusing to give defendant's offered instruction No. 10, which reads as follows:

> "The word 'feloniously' is descriptive of the act charged. To establish that an act was done feloniously it must be shown that the act was done with a mind bent on doing that which is wrong, or, as it has been sometimes said, with a guilty mind." (tr 204)

The Court instructed the jury as follows:

> "The word 'feloniously,' as used in the indictment, means that if the things were done that it is charged in the indictment that the defendant did, then the defendant was guilty of an offense against the laws of the United States constituting a felony as distinguished from a misdemeanor." (tr 223)

Exception was taken to the definition given by the Court before the jury retired (tr 244).

It is respectfully submitted that the indictment having charged that the representations as to citizenship were made feloniously, the defendant was entitled to have the jury advised as to the correct definition of the term.

In State v. Connors, 37 Mont. 15-21, 94 Pac. 199, it is stated:

> "The word 'feloniously' is descriptive of the act charged. It means that the act was done with a mind bent on doing that which is wrong, or, 'as it has been sometimes said, with a guilty mind.' "

State v. Rechnitz, 20 Mont. 488, 52 Pac. 264, is to the same effect.

We submit that the defendant was prejudiced in this case because in the voir dire examination the jurors who

sat at the trial were interrogated as to whether or not, if the court should give an instruction such as the defendant proposed, the jurors would have any hesitancy in following it and they said that they would not (tr 48, 51, 54, 58, 59, 60, 61).

Accordingly, when the court declined to give an instruction which we submit correctly defines the word "feloniously," the jury could properly infer that the word "feloniously" had no particular significance.

THE COURT ERRED IN DEFINING THE WORDS "KNOWINGLY AND WILFULLY"

Specifications of Error Nos. 14, 15, 24.

The Court erred in refusing to give the defendant's offered instruction No. 11. This is assigned as error in specification No. 14. The offered instruction No. 11 reads as follows:

> "You are instructed that the word 'Wilful,' when applied to the intent with which an act is done or omitted, implies a purpose or willingness to commit the act. It means intentionally; that is, not accidentally." (tr 205)

The Court instructed the jury as follows:

> "The word 'Wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law or injure another, or to acquire any advantage." (tr 222-223)

The Court erred in refusing to give defendant's offered instruction No. 12. This is assigned as error in Specification of Error No. 15. The offered instruction reads as follows:

> "The word 'Knowingly,' as used in this indictment, means with guilty knowledge, that is deliberately and with knowledge and not something which is merely

careless, or negligent or inadvertent." (tr 205)

The Court defined the word "knowingly" in its oral charge as follows:

> "I charge you that the word 'Knowingly' — it is charged he did these things knowingly—the word 'knowingly' imports only knowledge that the facts existed which bring the act or omission within the provisions of the law. It does not require any knowledge of the unlawfulness of such act or omission." (tr 222)

Exception was made to the definition before the jury retired (tr 242), and it is assigned as error in Specification No. 24.

We submit that the offered instructions should have been given in order that the jury might be clearly advised that guilty knowledge and an intent to defraud were essential elements of the crime charged.

In Browder v. United States, 312 U. S. 335, 85 L. Ed. 862-867, in a criminal prosecution for the unlawful use of a passport the court said:

> "Read in its context the phrase 'wilfully and knowingly,' as the trial court charged the jury, can be taken only as meaning 'deliberately and with knowledge and not something which is merely careless or negligent or inadvertent.' "

In Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495-1502, the court said:

> "We recently pointed out that 'wilful' is a word 'of many meanings, its construction often being influenced by its context.' At times, as the Court held in United States v. Murdock, 290 U. S. 389, 394, 78 L. Ed. 381, 384, 54 S. Ct. 223, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois C. R. Co., 303 U. S. 239, 82 L. Ed. 773, 58 S. Ct. 533. But, 'when used in a criminal statute it generally means an act done with a bad purpose.' In that event something more is required than the doing of the act prescribed by the statute. Cf. United States v. Bal-

int, 258 U. S. 250, 66 L. Ed. 604, 42 S. Ct. 301. An evil motive to accomplish that which the statute condems becomes a constituent element of the crime. Spurr v. United States, supra (174 U. S. p. 734, 43 L. Ed. 1152, 19 S. Ct. 812); United States v. Murdock, supra (290 U. S. p. 395, 78 L. Ed. 385, 54 S. Ct. 223). And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 314 U. S. 513, 524, 86 L. Ed. 383, 390, 62 S. Ct. 374."

We contend that in this case if the indictment is held sufficient nevertheless the government must show a criminal intent and that such intent was negatived by the instructions given by the court.

THE COURT ERRED IN ITS DEFINITION OF THE WORD "FALSELY"

Specification of Error No. 16.

The Court erred in refusing to give the defendant's offered instruction No. 13, reading as follows:

"The word 'Falsely' as used in this indictment means something more than an untruth and includes perfidiously or treacherously or with intent to defraud." (tr 205)

The Court instructed the jury with respect to the word "falsely" as follows:

"The word 'falsely'—it is charged that the representation was made falsely—that always imports a fraud, and the word 'falsely' as used in the indictment as describing the representation as to citizenship alleged to have been made by the defendant, means a representation made that is not true and that the party making it knows it is not true at the time it is made, and the party who makes it makes it at the time for the purpose of having the one to whom it is made believe it and accept it as true and act upon it as true, to the advantage and benefit of the one making it. When I say advantage to the one making it, it doesn't mean financial or monetary benefit, it means every kind of benefit which the one

making it thinks will accrue to him by reason of making the statement." (tr 223)

Exception was made to the definition before the jury retired, as follows:

"Mr. Acher: On the word, 'Falsely,' we except to the charge as failing to include as a part of the significance of the word a fraudulent or criminal intent.

The Court: I said the word 'falsely' involved fraud.

Mr. Acher: Perhaps, I was following it and I thought—maybe my recollection is wrong.

The Court: Maybe you better go ahead and take an exception.

Mr. Acher: I just want to call attention to another case, that it requires a fraudulent or criminal intent, 31 Federal 68, U. S. v. Otis.

The Court: Don't you think if one deliberately misstates a fact that he knows to be untrue for the purpose of having another accept it and act on it as criminal intent if the law makes it so?

Mr. Acher: That is what we object to, your Honor, the fact that a civil definition would not be sufficient. It is our contention—(interrupted)

The Court: It is not a civil definition, or if it is, it applies equally to the criminal law.

Mr. Acher: It is the rule followed in estoppel.

The Court: I think fraud is fraud whether it is in civil court or criminal court, and that is simply a definition of fraud." (tr 243)

The definition proposed by the defendant was taken from the language of the Circuit Court of Appeals from the second Circuit in United States v. Achtner (CCA 2) 144 F. (2d) 49, 52, where the Court said in considering the construction of the word "falsely" under the same statute here involved:

"Thus, it is said that the word 'falsely,' particularly in a criminal statute, suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously.'"

THE COURT ERRED IN HOLDING CORROBORATION UNNECESSARY ON THE THIRD COUNT

Specification of Error No. 19.

The Court erred in refusing to give the defendant's offered instruction No. 21 set forth in the appendix, pages 57-58, to the effect that under the third count of the indictment each essential element of the case must be proved by the testimony of two witnesses or of one witness and corroborating circumstances.

Specification of Error No. 26.

The Court erred in its oral charge that the direct evidence of one witness entitled the full credit was sufficient for proof of any fact embodied in the case (tr 225) to which objection was made before the jury retired (tr 244), which is set forth in the appendix, pages 57-58.

In the third count of the indictment it is alleged that the defendant "having been first duly sworn as a witness did wilfully and knowingly testify" falsely as to his citizenship (tr 4). Since the indictment charges that the false statements were made under oath we respectfully submit that the evidence of one witness was insufficient to sustain this count. Thus, in Fotie v. United States (CCA 8) 137 F. (2d) 831, where the charge was making a false statement under oath, the court concluded that perjury was charged and said:

"The charge here is the *falsity of an oath and not* the falsity of a statement as was the case in the first indictment. The requirements of proof to warrant a conviction are correspondingly greater. Warszower v. United States, supra. To sustain a conviction of perjury the burden was upon the government to prove the essential

elements of the crime charged by substantial evidence excluding every other hypothesis than that of guilt. . . . United States v. Norris, 300 U. S. 564, 574, 57 S. Ct. 535, 539, 81 L. Ed. 808. 'To convict a person of perjury, probably or credible evidence is not enough.' Phair v. United States, 3 Cir., 60 F. Ed. 953, 954. It is uniformly held by the federal courts that an uncorroborated oath is not enough to establish the falsity of an oath as to which perjury is charged. Goins v. United States, 4 Cir., 99 F. 2d. 147. The allegation that the testimony of one charged with perjury was false and that the appellant did not believe it to be true when he gave it under oath must be established by two witnesses or by one with circumstances of sufficient corroboration. Boehm v. United States, 8 Cir., 123 F. 2d. 791, 809, 810; Hart v. United States, 9 Cir., 131 F. 2d. 59, 61; United States v. Palese, 3 Cir., 133 F. 2d. 600, 602. The only evidence in support of the charge in this count of the second indictment is the proof of prior inconsistent admissions and contradictory statements of the appellant. But, in proving these admissions, the government also proved the qualifications and explanations which accompanied the great majority of them, and at the same time introduced incompetent and prejudicial testimony mentioned in the discussion of the first indictment. Under the authorities, the conviction of perjury obtained upon this character of evidence can not be permitted to stand."

The trial court held that the allegations that the defendant testified under oath would be disregarded as surplusage (tr 111). We submit that the indictment, having charged a false statement under oath, must be construed as seeking to charge perjury, and for that reason corroboration was necessary.

THE COURT ERRED IN EXCLUDING EVIDENCE WITH RESPECT TO KNOWLEDGE, INTENT AND MOTIVE, AND IN ITS CONSIDERATION OF THE EVIDENCE AND INSTRUCTION OFFERED ON THIS SUBJECT

Specification of Error No. 10.

"The Court erred in excluding the evidence contained in offers of proof 1, 2, 3 and 5, all made while the witness Paul W. Smith was on the stand, relating to the circumstances under which the applications for liquor licenses were considered by the Montana Liquor Control Board, these offers of proof being set forth in the appendix to this brief, pages 55-57."

Specification of Error No. 12.

"The Court erred in excluding from evidence certain minutes of the Stockmen's Club, a corporation, contained in proposed exhibits 17, 18, set forth in full in the appendix hereto, pages 59-60."

Specification of Error No. 18.

The Court erred in refusing to give defendant's offered instruction No. 16, as follows:

"You are instructed that if the evidence fails to show any motive on the part of the accused to commit the crime charged in the indictment, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict."

Specification of Error No. 28.

"The Court erred in its oral charge to the jury in stating that the defendant knew that in order to do business he applied for a liquor license himself and was to hold it for two years until the club became qualified (tr 238) to which objection was made before the jury retired (tr 244-245) as set forth in the appendix, pages 59-60."

Specification of Error No. 29.

"The Court erred in overruling the exceptions made

to the remarks of the Court during the course of the argument of the case to the jury (tr 211-212) as set forth in the appendix, pages 60-61."

The foregoing assignments of error all in effect relate to a single proposition and will be discussed together.

The evidence discloses that on October 14, 1944, a corporation, known as the Stockmen's Club, was organized under the provisions of Chapter 42 of the Civil Code of Montana (tr 163). This statutory provision authorizes the incorporation of non-profit corporations for charitable, benevolent or fraternal purposes (Secs. 6453-6461 RCM 1935).

The defendant, L. P. De Pratu, was President; Luella Lundby was Vice President, and Emma Lundby was Secretary-Treasurer of the corporation (tr 166). The two Lundby sisters were both citizens of the United States (tr 178).

The theory of the defense is outlined in the opening statement of counsel for defendant as follows:

"Mr. Acher: May it please the Court, counsel, ladies and gentlemen of the jury, the defendant in this case expects to prove that in 1944 an application was filed with the Secretary of State of the State of Montana, and a charter was issued to the Stockmen's Club, a non-profit organization, having clubrooms in Great Falls near the Northern Montana State Fair grounds. We expect to prove and it will be developed, that under the liquor and beer laws of Montana, a club is not entitled to sell beer or liquor until they have been in existence a certain number of years, one or two, I am not clear myself. The statutes say one in one place and two in another. In any event, the evidence will show that following the formation of this club as a corporation organized under the laws of Montana, a building was constructed. It took over a period of a year or more, building this building, and that about the time it was

ready for occupancy, application was made for beer and liquor license for this establishment.

"The evidence will show that the defendant, Mr. De Pratu, had been in the restaurant and hotel business for many years . . . this Club idea was conceived and carried into execution, and an application was filed for a beer and liquor license, presented through Mr. Sherman Smith, a lawyer, no relation to Paul W. Smith, attorney for the liquor Control Board, who rejected the application on the ground that the Club wasn't in existence a sufficient length of time. We expect to show that notwithstanding that fact, it was suggested a license could be issued to one of the individuals, and that without a new application a license was issued to Mr. De Pratu.

"That Mr. De Pratu was not intending to represent anything about his citizenship, and that the idea of the application was for the Stockmen's Club and not for Mr. De Pratu." (tr 140-141)

While the witness, Paul W. Smith, attorney for the Montana Liquor Control Board, was on the stand, on direct examination he testified:

"Q. I ask you to look at plaintiff's Exhibit 1 and plaintiff's Exhibit 2, particularly at the name of the applicant and the signature, and I will ask you did you have anything to do in your official capacity with the applications or with any licenses issued pursuant thereto? A. Yes, sir, I did." (tr 71)

Upon cross-examination the defendant sought to prove by offers of proof Nos. 1, 2, 3 and 5 that the applications for liquor licenses, upon which counts 1 and 2 of the indictment are based, were considered as applications of the Stockmen's Club and not as applications by De Pratu individually. These offers of proof were rejected.

The witness Paul W. Smith was recalled by the defendant. He testified that the applications for licenses were not presented directly by De Pratu, but by an attorney, Sherman W. Smith (tr 144). He testified:

"A. I told Sherman Smith and also Mr. Buley, who was administrator for the Board, that the Stockmen's Club could not hold a liquor license because it had not been organized prior to two years before making application to the Board, which was the Montana law." (tr 145)

It was developed that before liquor licenses could be issued, an applicant must first have a beer license (tr 79).

It will be noted that in Exhibits 1 and 2 the two liquor applications state:

"L. P. DE PRATU
(Full names of all applicants for this license. Please print or type.)
THE STOCKMEN'S CLUB
(Trade name which applicant, or applicants, intend to call such business.)
TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Liquor License and under oath make the following statements and answer the following questions, to-wit:

(1) State in what capacity you make this application:
PRESIDENT & MANAGER

(State whether owner, partner, or if corporation, state your office, if in any other capacity.)" (tr 75-77)

It will also be noted that in the beer application in evidence (Exhibit 3) the application states:

"THE STOCKMEN'S CLUB
(Trade name which applicant, or applicants, intend to call such business.)
TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Beer License and under oath make the following statements and answer the following questions, to-wit:

(a) State in what capacity you make this application:
CORPORATION

(State whether owner, partner, or if corporation, state your office, or any other capacity.)" (tr 158)

That it was the intention of the defendant De Pratu to make applications for the Stockmen's Club and not as an individual, we contend was reflected by the corporate minutes excluded from evidence.

Minutes of the corporation were introduced showing that on September 1, 1945, at a meeting of the Board of Directors, as follows:

> "The said L. P. De Pratu thereupon offered to obtain slot machine licenses in accordance with the laws of the State of Montana and beer and liquor licenses for said establishment in accordance with the laws of the State of Montana and to pay for same personally, providing he would be secured at some future date for said expenditure.
>
> "Upon motion duly made, seconded and carried, the said L. P. De Pratu was thereupon directed to obtain said licenses as above set forth." (tr 167)

However, Minutes of February 20, 1946 (Exhibits 17 and 18), in which it was reported that a State Liquor License had been secured were excluded from evidence (tr 169). We submit that Exhibits 17 and 18 afford some evidence that De Pratu was getting licenses for the Corporation and not for himself.

In the oral charge to the jury the court said that the defendant knew that in order to do business he applied for a liquor license himself since the club could not hold a license until it had been in existence two years (tr 238).

Exception was made to this charge (tr 245). The court then said that such was shown by the opening statement of counsel to the defendant to the jury (tr 245). Counsel then stated:

"Mr. Acher: I understood he filed the applications for the club and they wouldn't issue it to the club, and my offers of proof were designed to show that nevertheless the Board did issue it to him." (tr 245)

We submit that the record shows that counsel's criticism of the courts statement is justified by the record.

The defendant suffered prejudice in that the defense that the application was not intended to represent anything as to De Pratu's citizenship was virtually withdrawn from the jury.

Furthermore, the record shows that the other two incorporators of the club were citizens (tr 179). There was no need for De Pratu to make the application. Therefore, the Court by refusing to give offered instruction No. 16, in which it is stated that the absence of motive might be considered by the jury, also prejudiced the defendant.

The instruction offered was held to be a correct statement of the law in State v. Lu Sing, 34 Mont. 31, 39, 85 Pac. 369.

In 23 C. J. S. Sec. 1198, the rule is stated:

"Where the facts and evidence of the particular case require it, the jury should be instructed properly as to motive and the absence of motive."

The Court also refused to permit Counsel to argue to the jury that the application was treated by the Liquor Control Board as a Club application. We submit that it can fairly be inferred that the application was considered as an application by the club because Mr. Smith, the Board's attorney, gave the opinion that a license could not be issued to the club. If the application had been treated as made for De Pratu individually, surely Attorney Paul W. Smith would have had no occasion to say the club could not get a license. In other words, it is our contention:

(a) That the corporate minutes excluded from evidence were of evidentiary value to show that the defendant was not applying for a license as an individual but for the club.

(b) That the excluded testimony of Paul Smith, attorney for the Liquor Control Board, tended to show that the application was considered as being made by the club and not De Pratu.

(c) That the offered instruction on motive should have been given, since it could fairly be argued that there was no purpose in De Pratu making the application as an individual at all, if he were not a citizen, as the other two officers of the Stockmen's Club were citizens.

(d) That the court's instructions that De Pratu knew the club could not get a license and so applied individually is not based on evidence or upon the statement of Counsel for the defendant as shown by the record.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed for the following reasons:

One

That the indictment fails to charge a public offense.

Two

That the evidence is insufficient to sustain a judgment of conviction, and particularly to substantiate the charge that the defendant falsely claims United States citizenship.

Three

That the presumption of innocence was overruled by the court in favor of one of the presumption of the continuance of a state of facts.

Four

That the corpus delicti was proven only by statements made by the defendant.

FIVE

That the Court erred in instructing the jury that the appellant, having been born in Canada, was a citizen of Canada and an alien to the United States, and that this condition was presumed to continue until the contrary was shown.

SIX

The Court erred in refusing to give the jury instructions on derivative citizenship.

SEVEN

That the Court erred in refusing to give the jury instructions on circumstantial evidence.

EIGHT

That the Court erred in defining the words feloniously, knowingly and falsely, and that the Court erred in holding that corroboration was unnecessary on the third count.

NINE

That the Court erred in excluding evidence with respect to knowledge, intent and motive.

IT IS THEREFORE respectfully submitted that because of the foregoing the judgment of the District Court should be reversed.

Respectfully submitted,

CHARLES DAVIDSON
ARTHUR P. ACHER
Attorneys for Appellant

APPENDIX

Specification of Error No. 10.

The Court erred in excluding the evidence contained in offers of proof 1, 2, 3 and 5, as follows:

Offer of Proof No. 1

"Q. I will ask you, Mr. Smith, whether or not, is it not a fact that the plaintiff's Exhibit 2 was referred to you in your official capacity shortly prior to February 16, 1946, by Mr. Buley, the administrator for the Montana Liquor Control (69) Board, for an opinion as to whether or not a license could be issued to the Stockmen's Club?" (tr 85)

"Defendant's offer of proof No. 1: The defense offers to prove by the witness on the stand that he would have answered the question, to which objection has been made, in the affirmative.

"Mr. Pease: The Government objects to the offer of proof, first, on the ground that the matter is irrelevant; second, on the ground it is improper cross-examination and a part of the defendant's case in chief.

"The Court: Well, the offer of proof will be filed as defendant's offer of proof No. 1 by the Clerk and the objection will be sustained." (tr 86)

Offer of Proof No. 2

"Q. In giving that opinion, did you treat plaintiff's Exhibit 2 as an application by L. P. De Pratu or as an application by the Stockmen's Club?" (tr 88)

"Defendant's offer of proof No. 2: The defense offers to prove by the witness on the stand that he treated the application as that made by the Stockmen's Club.

"Mr. Pease: Objected to on the same grounds as stated in the last previous objection, particularly that the matter which is the subject of the offer is a matter of record, that the answer, if given, would not be the best evidence for that reason, and that the same is no part of the proper cross-examination of this witness, and if proper at all would be matter to be offered as part of the defense of the case.

"The Court: The offer will be filed as defendant's offer of proof No. 2, and the objection will be sustained."

OFFER OF PROOF NO. 3

"Q. Is it not a fact, Mr. Smith, that you advised Mr. Buley that the application could not be granted to the Stockmen's Club because they had not been in existence as a club for a sufficient length of time and that—(interrupted)"

"Mr. Pease: The question is objected to on the same grounds as stated in the objection to the last preceding offer of proof on the part of the defendant.

"The Court: Objection is sustained. It is hearsay also.

"Defendant's offer of proof No. 3: The defendant offers to prove that the witness would have answered the question in the affirmative.

"Mr. Pease: To the defendant's offer of proof No. 3, the Government objects on the same grounds as stated to the last question on cross-examination.

"The Court: The offer of proof will be filed and the objection will be sustained." (tr 89-90)

OFFER OF PROOF NO. 5

"Q. Is it not a fact, Mr. Smith, that the citizenship of Mr. L. P. De Pratu as an individual was not considered in connection with plaintiff's Exhibit 2 when you gave your decision as to the application?

"Mr. Pease: Objected to on the ground that it would be not the best evidence; it would be a matter or record; it is improper cross-examination; if relevant at all, it is part of the defense in the case, and isn't relevant as such.

"The Court: It is entirely immaterial whether it was or was not considered by the Board. It is a matter extraneous to this case. The question here before the jury, and the only question here is whether or not the defendant represented himself to be a citizen as set out in the indictment, and whether or not, if he did, that representation is true. That is the charge and that is the question here. The objection will be sustained. . . . "

"Defendant's offer of proof No. 5: Defendant offers to prove that the witness would have answered yes.

"Mr. Pease: The Government objects to the offer of proof numbered 5 on the same grounds as stated in the last objection, the objection to the last question.

"The Court: The offer of proof will be filed, and the objection will be sustained." (tr 91-92)

Specification of Error No. 19.

The Court erred in refusing to give the defendant's offered instruction No. 21, reading as follows:

"You are instructed that under the third count of the indictment each essential element of the case must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances, and it is not sufficient where the testimony of two witnesses testified to different elements of the crime charged, but the law requires in such case that two witnesses testify to each of the essential elements of the crime charged or that one witness has testified directly to such element and that the testimony of such witness is corroborated by the circumstances.

"It is, therefore, necessary for you to understand what is meant by the word 'corroborate' and 'corroboration.' To corroborate means to strengthen; to make more certain; to add weight or credability to a thing; to confirm by additional security; to add strength. Evidence which does any of these things is evidence which corroborates, and is corroborating evidence. It does not mean facts which, independent of the evidence being corroborated, will warrant a conviction, but it is evidence which tends to prove the defendant's guilt independent of the evidence which is corroborated." (tr 208-209)

Specification of Error No. 26.

The Court erred in the oral charge to the jury, as follows:

"The direct evidence of one witness entitled to full

credit is sufficient for proof of any fact embodied in this case." (tr 225)

to which objection was made, as follows:

"Mr. Acher: We except to the language of the Court that the direct evidence of one witness entitled to full credit is sufficient to prove any fact in this case upon the ground that count 3 contemplates a charge of making false statements under oath, and under the authority of Fotie v. United States, 137 F. 2d. 831, which distinguishes the Warszower-United States Supreme Court case—(interrupted)

"Court: Wasn't that a perjury case?

"Mr. Acher: They said it was a false statement and I am preserving the record. That is perjury in that they said it was a false—(interrupted)

"The Court: You have preserved it sufficiently. If I considered he was charged with perjury under the third count, I would have granted the motion to dismiss, but, as I view it, there is no charge of perjury and he has not been prosecuted for perjury." (tr 244)

Specification of Error No. 12.

The Court erred in excluding from evidence certain minutes of the Stockmen's Club, a corporation, as follows:

"(Exhibits 17 and 18, offered by the defendant, were here denied admission in evidence, and are as follows:)

Exhibit 17

'Minutes of Special Meeting of Board of Directors of the Stockmen's Club, held on Wednesday, February 20th, 1946.

'Pursuant to law and waiver of notice heretofore made, there were present Emma Lundby, Louella Lundby, and L. P. De Pratu in the clubhouse of said club in the city of Great Falls, on Wednesday, February 20th, 1946.'

Exhibit 18

'Whereupon, L. P. De Pratu reported to the meeting that he had duly obtained slot machine licenses for the

operation of eight slot machines, a State liquor license, a State beer license, a Cascade County liquor license, a Cascade County beer license, a City of Great Falls liquor license and a City of Great Falls beer license, together with the United States Government federal excise stamps and all of the necessary licenses issued by the State of Montana to operate a restaurant in connection with said club.

'Thereupon, by motion duly made, seconded and carried, the meeting confirmed all of the acts and actions of the said L. P. De Pratu.' (tr 169-170."

Specification of Error No. 28.

The Court erred in its oral charge to the jury, as follows:

"as I understand the testimony, the testimony of the witness is that the Stockmen's Club, although not a qualified applicant, it desired to do business, to sell liquor, and it is said here, as I understand the testimony of the defendant's witnesses themselves, that the defendant knew that, that in order to do business that he applied for a liquor license himself and was to hold it for the two years until the Club became qualified. So, what does that lead to? There had to be a liquor license issued under the laws of the State before the Club could legally sell liquor. They had to get it through deceit on behalf of the defendant because the Club could not hold a license, and he, as an incorporator, as a director, a stockholder and part owner of the corporation with two others, desired this business to be done and to do it under any circumstances." (tr 238)

Exception was made to the charge, as follows:

"Mr. Acher: We except to the language of the Court to the effect that it is suggested that the defendant knew the club could not get a license when the application was filed.

"The Court: It was your opening statement to the jury, that has been your contention all the way through. It was your opening statement to the jury that the cor-

poration could not get a license, and the defendant knowing that made arrangements to get the license.

"Mr. Acher: I understood he filed the applications for the Club and they wouldn't issue it to the Club, and my offers of proof were designed to show that nevertheless the Board did issue it to him.

"The Court: You know, as a matter of law, the Board couldn't do anything else but what it did do because the corporation was not qualified." (tr 244-245)

Specification of Error No. 29.

"The Court erred in overruling the exceptions made to the remarks of the Court during the course of the argument of the case to the jury (tr 211-212)."

In the oral argument the following occurred:

Mr. Acher made the opening argument on behalf of the defendant, during which argument the following transpired:

"Mr. Acher: . . . was considered by Mr. Smith as an application on behalf of the Stockmen's Club. (interrupted)

"The Court: Confine yourself to the evidence. No such evidence was permitted in the case. Objections were constantly sustained to that line of testimony. Confine yourself to the evidence. (tr 211)

"Mr. Acher: If the Court please, in connection with my argument and interruption by the Court, I have had a transcript prepared and submitted to your Honor. I would like to note an exception to the Court's remarks in view of the record.

"The Court: Well, yes, you may have an exception to the Court's remarks, but the Court's remarks will stand. The answer of the witness was that he 'told Sherman Smith and also Mr. Buley the Stockmen's Club could not hold a liquor license because it had not been organized prior to two years, before making application.' That is the answer of the witness. It forms no basis for your argument that it was considered by Mr. Smith as an application on behalf of the Stockmen's

Club. Mr. Smith never said that, it wasn't contained in his answer, so your argument was not based on the evidence. You may have an exception to the remarks made to your argument, and to the remarks I make now in the presence of the jury." (tr 212)